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No. 86-892

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NICODEMUS JOSEPH,

Petitioner,

v.

BARBARA ALEXANDER,
WILLIAM ALEXANDER, and
NICOLE LYNN ALEXANDER,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO FIFTH DISTRICT COURT OF APPEALS

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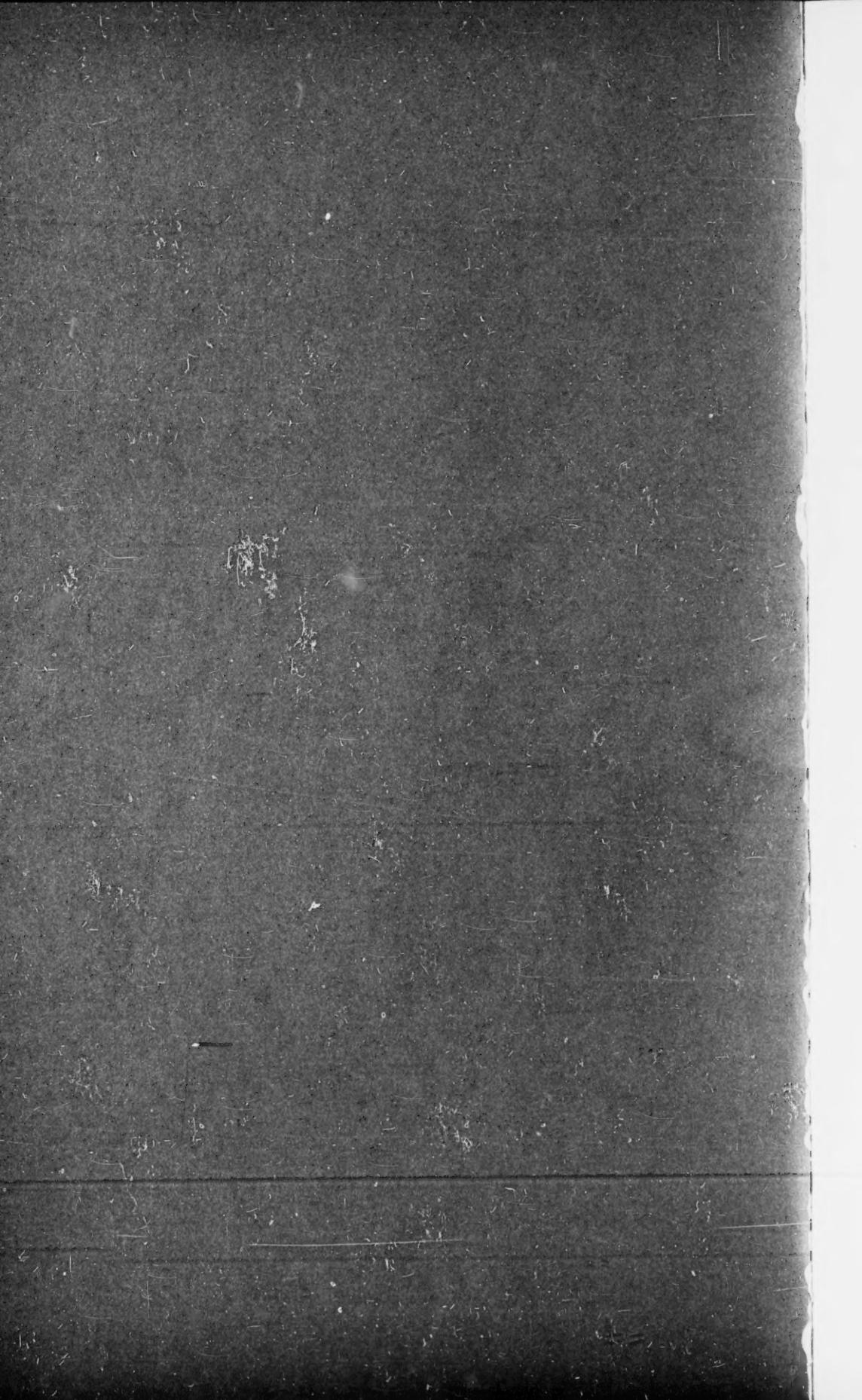


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STATEMENT OF THE CASE

The Respondents, Barbara Alexander and William Alexander, were lawfully married in 1968. They have remained lawfully married continuously to the present day. The Respondents have three minor children born issue of their marriage, one of whom, Nicole Lynn Alexander was born on October 8, 1977.

At the time that Nicole Lynn Alexander was conceived, the Petitioner, Nicodemus Joseph was an ordained Serbian Orthodox priest. Barbara Alexander had been consulting with the priest as a marriage counselor, and the priest entered into a seduction of Barbara Alexander, without the knowledge of her husband William Alexander.

After the birth of Nicole Lynn Alexander, the Petitioner filed a complaint seeking to be declared the natural father of Nicole Lynn Alexander and joined as party defendants, Nicole Lynn Alexander, William Alexander, and Barbara Alexander.

The defendants denied the allegations of the Petitioner. The complaint was dismissed for failure to state a claim upon which relief could be granted, a decision which was affirmed by the Ohio Court of Appeals for the Fifth Judicial District.

The Ohio Supreme Court reversed in *Joseph v. Alexander*, 12 Ohio St. 3d 88 (1984) and in its first syllabus to the opinion therein, stated the controlling law of the State of Ohio as follows:

While every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there was no

sexual relations between husband and wife during the time in which the child must have been conceived.

Upon remand from the Supreme Court of Ohio, the respondents propounded to the trial court that the first syllabus of the Supreme Court of Ohio from *Joseph v. Alexander*, 12 Ohio St. 3d 88 (1984) was the controlling law of the case to be applied by the trial court.

The trial court refused to instruct the jury in accordance with this statement of the law of Ohio, and the jury returned a verdict in favor of the Petitioner.

The evidence at trial was undisputed that Barbara Alexander was engaging in sexual relations with William Alexander during the time in which Nicole Lynn Alexander was conceived.

Upon appeal by the Respondents herein, the Ohio Court of Appeals for the Fifth Judicial District reversed and entered final judgment for the Respondents, specifically finding that the Petitioner had not offered one shred of evidence to rebut that testimony which was presented as to the sexual relations between Barbara and William Alexander during the time of conception.

REASON FOR DENYING THE WRIT

- 1. The decision by the Ohio Court of Appeals for the Fifth Judicial District reversing the jury verdict in favor of the Petitioner did not violate Petitioner's due process rights under the Fourteenth Amendment.**

The first syllabus of the opinion of the Supreme Court of Ohio in *Joseph v. Alexander*, Supra established the controlling law of the State of Ohio for the

determination of parentage where a child is born to a woman who is lawfully married at the time of conception.

That syllabus which reflects the public policy of the State of Ohio is as follows:

While every child conceived in lawful wedlock is presumed legitimate, such presumption is not conclusive and may be rebutted by clear and convincing evidence that there were no sexual relations between husband and wife during the time in which the child must have been conceived.

Joseph v. Alexander, Supra

No appeal was taken by the Petitioner herein to a higher Court from the judgment of the Ohio Supreme Court in *Joseph v. Alexander*, 12 Ohio St. 3d 88 (1984).

Petitioner has contended that the judgment of the Ohio Fifth District Court of Appeals in *Joseph v. Alexander*, unreported Case No. CA-6782 (May 5, 1986) which applied the syllabus of the Ohio Supreme Court in *Joseph v. Alexander*, 12 Ohio St. 3d 88 (1984) as the controlling rule of law to the evidence in the record at trial has violated Petitioner's due process rights under the Fourteenth Amendment.

The Petitioner's claim of violation of his due process rights is not supported by judgment of the Ohio Supreme Court in *Joseph v. Alexander, Supra* wherein the Ohio Supreme Court expressly stated in its first syllabus that the presumption of legitimacy was *not* conclusive and *could* be rebutted by clear and convincing evidence that the husband and wife had no sexual relations during the time of conception.

Further, the results of the HLA and Blood Grouping Tests were admitted into evidence.

Under the unique facts and circumstances of this case, the Petitioner, who had a full and ample opportunity to do so, offered not a shred of evidence to rebut the testimony of the Respondents that they were engaging in sexual relations during the time in which the child was conceived.

It is fundamental that in order to confer jurisdiction upon the United States Supreme Court to review a State Court's decision, that the Federal question has been properly raised and passed upon by the highest court of that state. *Home Insurance Co. v. Dick*, 281 U.S. 397; *Whitfield v. Ohio*, 297 U.S. 431.

The Petitioner did not raise the issue of denial of due process before the Ohio Court of Appeals, Fifth Appellate District in *Joseph v. Alexander*, Unreported Case No. CA-6781 (May 5, 1986) and only put forth in his Memorandum in Support of Jurisdiction to the Ohio Supreme Court the proposition of law that the judgment of the Ohio Court of Appeals, Fifth Appellate District established an irrebuttable presumption that violates the due process clause of the Fourteenth Amendment.

The Petitioner's due process violation which he proounds in his petition for a Writ of Certiorari was not raised before nor passed upon by the highest court of the State of Ohio.

2. The interpretation given to Chapter 3111 of the Ohio Revised Code by the State of Appellate Court does not deny Petitioner due process and equal protection under the Fourteenth Amendment.

Petitioner did not raise by Assignment of Error in the Ohio Court of Appeals, Fifth District; at trial; nor

by Memorandum in Support of Jurisdiction in the Ohio Supreme Court the issue of denial of equal protection under the Fourteenth Amendment, nor was that issue passed upon by the highest Court of the State of Ohio.

The State of Ohio has the reserve power to establish public policy in the area of family relationships.

As the Supreme Court of the United States has stated in Justice Stewart's concurring opinion in the case of *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977)

We have little doubt that the due process clause would be offended if a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

The decision of the Supreme Court of Ohio in *Joseph v. Alexander*, 12 Ohio St. 3d 88 (1984) from which no appeal was taken represents the public policy of the State of Ohio that the interests of the nuclear family, the child, and the individual be balanced.

The State Supreme Court has that right, and in enunciating that public policy has given the Petitioner the notice, opportunity for a hearing, and opportunity to meet his burden of proof which due process under the Fourteenth Amendment entails.

3. Public Policy of the State of Ohio regarding the percentage of children was not violated by the judgment of the State Appellate Court.

The child, Nicole Lynn Alexander, was represented throughout all State Court proceedings by a Guardian Ad Litem, Attorney Patrick Menicos, who was appointed by the trial court.

There is no evidence in the record to establish that Nicole Lynn Alexander was not responsibly and financially supported by the Respondents.

The record also establishes that the Guardian Ad Litem joined as an appellant to appeal from the judgment of the trial court to the Ohio Court of Appeals, Fifth District.

This action arises from a unique set of facts and circumstances and must be examined in light of the same.

CONCLUSION

For the reason set forth in this Brief in Opposition to the Petition for a Writ of Certiorari to the Ohio Fifth District Court of Appeals, the Respondents; William Alexander; Barbara Alexander; and Nicole Lynn Alexander, by Patrick Menicos, Guardian Ad Litem for Nicole Lynn Alexander request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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